



Comptroller General  
of the United States  
Washington, D.C. 20548

*M. Dineen*

144082

## Decision

**Matter of:** Mikalix & Company  
**File:** B-241376.3  
**Date:** June 5, 1991

David B. Dempsey, Esq., and S. Lawrence Kocot, Esq., Akin, Gump, Strauss, Hauer and Feld, for the protester.  
James F. Trickett, Department of Health and Human Services, for the agency.  
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest that agency does not have a reasonable basis to cancel request for proposals set aside for small businesses is sustained where basis for cancellation is that protester, the only offeror remaining in the competitive range, submitted unreasonably high proposed costs, but agency improperly failed to conduct meaningful discussions with protester relating to its proposed costs.

### DECISION

Mikalix & Company protests the decision of the Department of Health and Human Services (HHS) to cancel request for proposals (RFP) No. 282-90-0023, and recompute the requirement after the Small Business Administration (SBA) determined that the awardee, Health Systems Research, Inc. (HSR), was ineligible for award under the RFP. Mikalix argues that HHS does not have a reasonable basis for canceling the solicitation and contends that HHS should either award the contract to the firm, or reopen negotiations with Mikalix and give the firm an opportunity to submit a revised best and final offer (BAFO).

We sustain the protest.

### BACKGROUND

The RFP was issued on June 26, 1990, as a total small business set-aside to provide technical and administrative support services to the Public Health Service's Forum for

Quality and Effectiveness in Health Care (FQHEC).<sup>1/</sup> The RFP, which contemplated award of a cost-plus-fixed-fee contract for the support services for a 5-year period, required offerors to submit separate technical and business management (cost) proposals. Paragraph M.4 of the RFP, titled "Negotiation and Selection of Successful Offeror," states in part:

"Negotiations will be conducted with those offerors determined to have submitted technically acceptable proposals together with a realistic cost estimate. You are advised that paramount consideration shall be given to the evaluation of technical proposals rather than cost or price unless, as a result of technical evaluation, proposals are determined to be essentially equal, in which case cost or price shall then become the determining factor." (Emphasis in original).

A technical evaluation committee (TEC) numerically rated the six initial proposals received by the August 7 closing date on the basis of four main technical criteria and listed subcriteria worth a maximum possible weighted score of 100 points. The TEC report shows that the average scores received by the initial proposals submitted by HSR (88.0 points) and Mikalix (87.7 points) were virtually identical.<sup>2/</sup> Of the six initial proposals, the agency found only the proposals submitted by HSR and Mikalix technically acceptable and within the competitive range.

HSR's and Mikalix's cost proposals were reviewed by a cost analyst and by the project officer, who evaluated the reasonableness and appropriateness of the proposed costs and fees to the government for the first year of the contract only. Mikalix initially proposed \$1.9 million, while HSR proposed \$1.6 million in estimated costs for the first year of the contract. Regarding total cost, Mikalix proposed the

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1/ The FQHEC was established as part of the Agency for Health Care Policy for the purpose of promoting the quality, appropriateness, and effectiveness of health care. The RFP contemplates award of a contract to assist FQHEC in the development, periodic review, and updating of medical guidelines, standards of quality, performance measures, and criteria for reviewing and assessing the provision and quality of health care. See 42 U.S.C.S. §§ 299b et seq. (Law. Co-op. Supp. 1990).

2/ The average scores of the three other acceptable proposals ranged from 70.3 to 78.0 points, while the sixth proposal earned an average of 46.3 points and was deemed unacceptable.

highest (\$10,414,741) and HSR the second highest (\$8,842,061) estimated total cost for the 5-year period, exceeding the independent government estimate (\$6,650,000) for the 5-year period by nearly 57 and 33 percent, respectively. On September 17, HHS held oral discussions and requested BAFOs from the two firms.

Mikalix slightly reduced its total estimated cost in its BAFO; HSR's proposed total BAFO cost, however, was approximately \$2.7 million below Mikalix's. Since the technical proposals were essentially equal, HHS selected HSR as the firm submitting the proposal deemed most advantageous to the government on the basis that it offered the lowest estimated total cost, and awarded the contract to that firm on September 25.

Although HSR had self-certified that it was a small business, in response to a timely challenge by Mikalix to HSR's small business size status, SBA's Philadelphia Regional Office determined on November 26, 1990, that HSR was not a small business concern for purposes of this procurement, and that HSR was therefore ineligible for award under the RFP. On January 8, 1991, SBA's Office of Hearings and Appeals (OHA) affirmed the prior finding that HSR is not a small business.

In a letter to our Office submitted after OHA's ruling, HHS stated that it intended to terminate HSR's contract for the convenience of the government and conduct a new small business set-aside competition.<sup>3/</sup> Although the agency acknowledged in its letter that Mikalix was the only other offeror in the competitive range, HHS stated that cancellation of the RFP is proper because Mikalix's proposed costs were unreasonably high, and that sufficient funds are not available to award the contract to Mikalix at the firm's proposed cost. The agency maintains that a new competition would permit Mikalix and other potential offerors to restructure their

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3/ During an informal conference held at our Office on March 14, the agency revealed that it had not yet terminated HSR's contract pending resolution of Mikalix's protest challenging the agency's proposed corrective action. HHS relies on our decision in Department of Health and Human Servs.--Recon., B-231885.2, June 2, 1989, 89-1 CPD ¶ 521, to justify HSR's continued performance. Contrary to the agency's suggestion, however, our decision did not grant agencies the "right" to continue performance of a contract by an ineligible awardee. We merely recognized that under the very limited facts of that case, it was impracticable to phase out certain detailed tasks that would have unduly delayed completion of HHS' statutorily-mandated annual report. Here, HHS has presented no circumstances compelling continued performance by HSR.

proposals or find other methods of meeting the government's requirement at more reasonable prices. Mikalix subsequently filed this protest in our Office on January 29, challenging the agency's proposed corrective action.

Mikalix argues that if HHS considers the proposed costs in its BAFO to be unreasonable, then HHS improperly failed to conduct meaningful discussions with the firm because HHS never indicated that the firm's initial proposed costs were unreasonable. Mikalix requests that, since its proposed costs are reasonable and it is the only offeror remaining in the competitive range, we direct HHS to make award to Mikalix. Alternatively, Mikalix requests that we recommend that HHS, rather than canceling the solicitation and recompeting the requirement, reopen negotiations with the protester and allow the firm to submit a revised BAFO.

#### DISCUSSION

##### Cancellation of the RFP and Adequacy of Discussions

The protester contends that HHS cannot properly justify its decision to cancel the RFP on the basis that Mikalix's proposed costs were unreasonably high. Mikalix takes the position that if its reduced BAFO cost is unreasonable, as the agency now alleges, then HHS failed to conduct meaningful discussions with the firm because at no time did HHS inform Mikalix that its initial proposed cost exceeded what the agency considered reasonable. Mikalix asserts that HHS did not voice any concern over its allegedly unreasonable cost during discussions, nor informed the firm that its proposed levels of effort (LOE) exceeded what the agency considered reasonable. Mikalix states that during negotiations, HHS merely pointed out certain LOE that were considered to be slightly high; questioned Mikalix concerning certain overhead costs (e.g., telephone, telefacsimile, postage, reproduction, etc.), which were not previously included in its initial cost proposal; and urged Mikalix to include these costs in its BAFO.

In a negotiated procurement, the contracting officer has broad discretion in determining whether to cancel a solicitation and needs only to have a reasonable basis to do so. Victorio Inv. Co., Ltd., B-236024, Nov. 1, 1989, 89-2 CPD ¶ 406. Here, HHS' proposed decision to cancel the RFP is based on its determination that Mikalix's proposed estimated cost is unreasonable. The propriety of canceling the RFP thus depends on the adequacy of the discussions HHS held with the protester.

Regardless of its rationale for retaining Mikalix in the competitive range,<sup>4/</sup> when an agency requires goods or services by means of a negotiated procurement, the Competition in Contracting Act of 1984, 41 U.S.C. § 253b(d)(2) (1988), as reflected in FAR § 15.610(b), requires that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. Such discussions must be meaningful, and in order for discussions to be meaningful, agencies must point out weaknesses, excesses, or deficiencies in proposals unless doing so would result either in disclosure of one offeror's approach to another or in technical leveling. The Faxon Co., 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425.

During discussions, agencies are prohibited from advising an offeror of its cost standing relative to other offerors, FAR § 15.610(e)(2)(ii), and are not required to point out that a proposed cost is too high if the price is still below the government estimate. University Research Corp., B-196246, Jan. 28, 1981, 81-1 CPD ¶ 50. On the other hand, discussions cannot be meaningful if an offeror is not apprised that its cost exceeds what the agency believes to be reasonable. Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54, aff'd, B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333. Applying this standard here, based upon the agency's failure to point out to Mikalix that its estimated cost exceeded what the agency considered reasonable, we conclude that HHS failed to conduct meaningful discussions with Mikalix.

The agency states that it retained no contemporaneous records of the discussions with Mikalix. HHS agreed during the informal conference at our Office, however, that an affidavit by the project officer, who led the discussions with Mikalix and whose cost analysis formed the basis for such discussions,

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<sup>4/</sup> Relying on our decision in Electrospace Sys., Inc., B-234006.2, Feb. 13, 1990, 90-1 CPD ¶ 184 (higher-priced offeror reasonably retained in competitive range where only two offerors remained and acceptability of lower-priced offeror was not assured), HHS states that it included Mikalix in the competitive range because the contracting officer could not determine beforehand how much Mikalix's estimated costs might have decreased as a result of discussions, adding that it is almost always reasonable and proper to include a doubtful competitor in the competitive range. See Federal Acquisition Regulation (FAR) § 15.609(a).

would be useful to resolving this protest in its favor.<sup>5/</sup> HHS has not filed any affidavits to rebut Mikalix's statements and in its comments on the conference, HHS states that the project officer's recollection of the negotiations with Mikalix is "not clear enough to make a sworn affidavit appropriate."

To corroborate its position, Mikalix has provided us with the affidavits of its managing partner and of the two other individuals who participated in the discussions on behalf of Mikalix, together with a copy of each individual's handwritten contemporaneous notes documenting the discussions. In his affidavit, the managing partner states that Mikalix was informed that its direct labor costs were reasonable, and that its LOE in the clerical areas was "slightly" high, but vehemently denies that HHS ever described Mikalix's proposed cost as unreasonable or its LOE as "excessive." On the contrary, the managing partner states that at the end of the negotiations, he had the uncomfortable feeling that the discussions were leading to a BAFO cost not materially different from Mikalix's original proposed cost. The managing partner further states that he was left with the impression following discussions that Mikalix's cost was within the government's estimate, leaving him to justifiably conclude that no material changes needed to be made to Mikalix's cost proposal. The managing partner's contemporaneous record of the discussions, as well as the other two affidavits and corresponding supporting notes documenting what transpired during the negotiations, are consistent with Mikalix's position.

In support of its position, the agency relies on two documents, which allegedly show that HHS discussed "several cost issues" during the negotiations with Mikalix: the project officer's September 13, 1990, memorandum summarizing his review of Mikalix's cost proposal; and the cost analyst's September 17 detailed analysis of Mikalix's cost proposal. According to HHS, the recollection of the individuals who participated in the discussions on behalf of the agency is that the project officer's and cost analyst's memoranda were relied upon and reflect what Mikalix was told during the negotiations, which included a discussion of Mikalix's "excessive" LOE in all categories.

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<sup>5/</sup> The project officer did not attend the informal conference. Of the three individuals who participated in the discussions with Mikalix, only the contract specialist attended the informal conference, and she could not specifically recall what transpired during the negotiations.

The project officer's and cost analyst's memoranda, however, do not support the agency's position. While the documents offered by HHS refer to certain issues related to Mikalix's proposed LOE, they do not support a finding that HHS informed Mikalix during negotiations that its total estimated cost was unreasonable or that its LOE was "excessive" in any category. The cost analyst states in his memorandum, for example, that he reviewed the cost proposals, focusing his analysis on the budget Mikalix proposed for the first year of the contract only. Except for recommending that certain fringe benefits be recomputed resulting in a net reduction of \$2,025 to Mikalix's proposed costs for the first year of the contract (\$1.9 million), the cost analyst does not suggest that any of the estimated costs or LOE proposed by Mikalix are unreasonable or excessive.

While the project officer's memorandum concludes that Mikalix's mix of staffing was reasonable, it states that Mikalix's LOE across all categories is "somewhat high" and "especially high" in the clerical area; nowhere in his brief comments, however, does the project officer state that Mikalix's estimated cost is unreasonable or that its proposed LOE is "excessive" across all categories, as the agency maintains. The project officer's memorandum further indicates that Mikalix's proposed travel, consultant and additional editorial consultant costs are "reasonable," while indicating that daily fees are "somewhat high." The project officer also points out that the bibliographic search charges are "not unreasonable" and questions how certain overhead costs (e.g., telephone, postage, telefacsimile, etc.) not included in Mikalix's cost proposal would be handled. In lieu of an affidavit from the project officer, HHS did provide us with a brief memorandum dated March 22, in which the project officer essentially restates the conclusions of his review of Mikalix's cost proposal.

Even assuming, as HHS contends, that the project officer's and cost analyst's memoranda are a reflection of what Mikalix was told during discussions, this advice did not give Mikalix adequate notice that its cost estimate exceeded what the agency considered reasonable, or that its LOE was so excessive that award to the firm would not be possible because Mikalix's proposed costs were unreasonable.<sup>6/</sup> We conclude that the

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<sup>6/</sup> Our finding that the documents submitted by HHS do not support the agency's position is consistent with and bolstered by HHS' assertion in its report to our Office that "it was only after the receipt of [BAFOs] that Mikalix was clearly seen to be unreasonably priced." The record simply does not indicate that Mikalix was ever told during the

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agency's failure to indicate to Mikalix during discussions either that its estimated cost or that its proposed LOE exceeded what the agency considered reasonable, prejudiced Mikalix because the firm was denied the opportunity to submit a more competitive BAFO. Accordingly, we sustain Mikalix's protest on the basis that HHS failed to conduct meaningful discussions with the firm. Price Waterhouse, 65 Comp. Gen. 205, supra. In view of our finding that the agency did not conduct meaningful discussions with the protester, HHS' conclusion that the protester's costs are unreasonably high is not a reasonable basis to cancel the RFP.

#### Recommendation


Since the agency states that sufficient funds are not available to award the remaining portion of the contract to Mikalix at its BAFO price, we recommend that HHS promptly terminate HSR's contract for the convenience of the government, reopen negotiations with Mikalix and afford the protester the opportunity to submit a revised estimated cost covering the period remaining under the RFP, and award the contract to Mikalix if otherwise reasonable. In the alternative, if HHS concludes that any of the three remaining offerors which submitted acceptable proposals would have been included in the competitive range had HSR's proposal not been considered initially, then HHS should revise the competitive range, conduct discussions, and request BAFOs covering the period remaining under the RFP.

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6/ (...continued)  
negotiations that its proposed cost was unreasonable; nor does the record support a conclusion that HHS' cost evaluators so regarded Mikalix's initial proposal. We note that there is not even any documentation for the agency's statement that after BAFOs, Mikalix was "clearly seen to be unreasonably priced." On the contrary, in a memorandum to the contracting officer concerning his review of BAFOs, the project officer states that Mikalix's BAFO "was responsive to the issues raised during negotiations and [is] acceptable."

Mikalix is entitled to recover its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991). Mikalix should submit its claim for costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.

*for*   
Comptroller General  
of the United States